

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Reexamination of Roaming Obligations of
Commercial Mobile Radio Service Providers

WT Docket No. 05-265

To: The Commission

REPLY COMMENTS OF NEXTEL PARTNERS, INC.

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January 26, 2006

TABLE OF CONTENTS

	Page
SUMMARY	ii
I. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO JUSTIFY THE IMPOSITION OF BURDENSOME ROAMING REGULATIONS.....	1
II. NEXTEL PARTNERS STANDS BY ITS DEALINGS WITH SOUTHERNLINC	5
A. Nextel Partners Has Negotiated With SouthernLINC and Has Offered to Enter Into a Roaming Agreement	6
B. SouthernLINC's Business Challenges are the Result of its Own Business Decisions.....	8
III. THE COMMISSION SHOULD FOCUS ITS REGULATORY EFFORTS ON THE PROPER MARKET.....	10
IV. SOUTHERNLINC'S PROPOSAL FOR A DEEMED REASONABLE RATE IS FRAUGHT WITH PROBLEMS	13
A. A "Lowest Prevailing Rate" Proposal Has Significant Implementation Problems	13
B. SouthernLINC's Proposal Does Not Reflect The Value Of The Network.....	14
C. Carriers Will Not Be Allowed To Achieve The Benefits Of Their Network Buildout.....	16
V. SOUTHERNLINC'S ARGUMENTS REGARDING HURRICANE KATRINA ARE MISPLACED AND FACTUALLY INCORRECT.....	16
CONCLUSION.....	18

SUMMARY

Nextel Partners recommends that the Commission maintain its current roaming rules and reject proposals to require carriers to enter into automatic roaming agreements. The Commission's deregulatory policies have produced a highly-competitive CMRS market in which customers have many options for service (including service outside of their home market), and carriers have sufficient opportunities and incentives to establish roaming arrangements. Commenters that support a mandatory automatic roaming rule rely on conclusory statements that do not demonstrate anticompetitive conduct or consumer harm. While such commenters may not have obtained roaming services at their preferred rates, there is no evidence that those outcomes are the result of anticompetitive conduct. Companies have valid business reasons for valuing roaming agreements differently, and those differences can logically account for the results complained of by proponents of automatic roaming. The fact that no proponents of automatic roaming have pursued complaints under Sections 201, 202, and 208 of the Act is further reason to believe that no anticompetitive conduct has occurred.

SouthernLINC claims its position is supported by its negotiations with Nextel Partners and Nextel Communications. Nextel Partners fully stands by its dealings with SouthernLINC. Nextel Partners' actions have been appropriate, pro-competitive, and based on its own specific business considerations. The fact that SouthernLINC has not chosen to do business with Nextel Partners at a rate that Nextel Partners deems reasonable is not a reason to change national policy, and is instead consistent with the operation of competitive markets.

SouthernLINC has challenges in meeting the needs of a market segment that wants national coverage plans. These challenges are primarily the result of SouthernLINC's business decisions to be a regional carrier and to be one of very few providers using Motorola's iDEN platform. These business decisions have provided SouthernLINC with product differentiation

and significant competitive advantages. These business decisions also mean (and should mean) that SouthernLINC will have a harder time meeting the needs of certain other market segments. SouthernLINC should not expect to reap the benefits of being a regional iDEN carrier and have the Commission relieve it of the challenges that come with such differentiation. If SouthernLINC's decision to be a regional carrier using iDEN technology has meant that it will be more expensive or difficult to provide nationwide coverage areas, that is an appropriate market outcome that should not be fixed by regulators.

Proponents of an automatic roaming rule rely heavily on analyses that argue there is market failure because of insufficient competition in the various markets for roaming services. By defining the "market" as the market for roaming service, these commenters have departed from Commission precedent and sound economic principles. The proper focus for any Commission analysis must be the end-user market. Wholesale markets may not have the same level of competition as do retail markets, but that will be true in most competitive markets. The Commission's policy of encouraging competing technologies, which it has found to greatly benefit consumers, has guaranteed this result. As in most markets, the level of wholesale competition need not be a regulatory concern where the end user market remains fully competitive.

SouthernLINC's proposal that the Commission mandate intercarrier roaming charges based on "lowest prevailing rates" offered to consumers must be rejected. The proposal would be difficult to implement, would lead to litigation, and would give carriers clear incentives to price retail offerings in order to drive wholesale markets. The proposal also fails to reflect the value of the roamed-on carrier's network for three reasons. First, very few retail customers pay the per-minute rate generated by assuming that the largest bucket of minutes is fully used, so this

benchmark is simply not meaningful. Second, the proposal requires that wholesale roaming minutes be sold at the retail rate charged for local calls, even though local service and roaming service are valued differently by consumers. Third, this proposal would create opportunities for arbitrage, as Nextel Partners would be forced to sell its assets to SouthernLINC, which would then resell those assets at a 700% profit. This result is inequitable and would never occur in a competitive market.

Carriers have built out networks based on the assumption that they will be able to use their buildout to gain a competitive advantage. Proposals to mandate automatic roaming at prices based on local retail offerings would take that competitive advantage away. This would be inequitable, would stifle investment, and would ultimately hurt consumers.

Finally, SouthernLINC argues that the Commission should make policy to benefit regional carriers because of SouthernLINC's response to the devastation of Hurricane Katrina in 2005. All wireless carriers in these areas – not just regional carriers – took significant action to prepare for and respond to this natural disaster, and there is no reason to believe that regional companies are *per se* better at designing, building, or maintaining wireless networks. In fact, in responding to this disaster, SouthernLINC's was likely driven by the fact that its biggest customers are its five affiliated power companies with special communications needs. That is not a "regional focus," it is a customer focus.

However, this docket was not initiated to address emergency preparedness and emergency responsiveness. Instead, the Commission has sought comment on how to make policy for the industry as a whole. While focusing on Hurricane Katrina may evoke emotion, it should not take the focus away from the question facing the Commission – whether roaming arrangements should be the product of market forces or regulatory mandate.

Nextel Partners disagrees with certain factual statements made by SouthernLINC that suggest other carriers did not respond as quickly or as successfully as it did. Nextel Partners had cell sites operational in Gulfport, Mississippi, as soon as August 31, 2005, had restored over 85% of affected services by September 6, and used 11 temporary sites (including a Cell on Wheels in Gulfport) to meet customers' needs in these areas.

For these reasons, the Commission should reject proposals to require automatic roaming.

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REPLY COMMENTS OF NEXTEL PARTNERS, INC.

Nextel Partners, Inc. ("Nextel Partners") hereby submits its Reply Comments on the *Memorandum Opinion & Order and Notice of Proposed Rulemaking* ("NPRM")¹ in the above-captioned proceeding. The *NPRM* seeks comment on whether the Federal Communications Commission ("Commission") should modify its current rules regarding roaming requirements applicable to commercial mobile radio service ("CMRS") providers given the current state of the CMRS market.²

I. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO JUSTIFY THE IMPOSITION OF BURDENSOME ROAMING REGULATIONS

In its initial comments, Nextel Partners recommended that the Commission maintain its current roaming rules and reject proposals to require carriers to enter into automatic roaming agreements.³ The Commission's deregulatory policies have produced a highly-competitive CMRS market in which customers have many options for service (including service outside of their home market), and carriers have sufficient opportunities and incentives to establish roaming

¹ *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, FCC 05-160 (Aug. 31, 2005) ("NPRM").

² *NPRM*, ¶ 1.

³ Nextel Partners Comments, p. 4.

arrangements.⁴ In response to the *NPRM*, a number of commenters advocate in favor of a mandatory automatic roaming rule. Yet these commenters rely on conclusory statements that do not demonstrate anticompetitive conduct or consumer harm. In light of its longstanding and successful preference for competition, the Commission should not impose new regulations in the absence of compelling evidence of harmful anticompetitive conduct.

The Commission has consistently found that roaming regulations serve the public interest “[o]nly where market forces alone are not sufficient to ensure the widespread availability of competitive roaming services and where roaming is technically feasible without imposing unreasonable costs on CMRS providers.”⁵ This is consistent with national policy regarding wireless services generally,⁶ and Congress’ stated goal of creating telecommunications markets that rely on competition rather than regulation.⁷ As several carriers have noted, this reliance on competition has undoubtedly led to markets for CMRS that provide tremendous consumer benefits.⁸

⁴ *Id.* at 5.

⁵ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Report and Order Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, ¶ 9 (1996) (“*Second Report and Order and Third NPRM*”).

⁶ *Implementation of Section 332 of the Communications Act*, 12 FCC Rcd 9972, ¶ 22 (1997) (“market forces – not regulation – should shape the developing CMRS marketplace”).

⁷ 47 U.S.C. § 332(a)(2)-(3); Preamble, Telecommunications Act of 1996, Publ. L. No. 104-104, 110 Stat. 56 (1996).

⁸ See e.g., Cingular Wireless Comments, pp. 23-24 (free market competition fostered innovation of and acceptance for digital one rate plans, which have benefited both small and large market consumers); T-Mobile Comments, p. 6 (CMRS competition and consumer demand drives the development and deployment of innovative technologies); Verizon Wireless Comments, p. 1 (“Market based roaming practices have fostered investment in new technologies and produced many benefits to consumers of CMRS products and services.”).

Proponents of an automatic roaming rule fail to overcome the heavy presumption in favor of allowing end user service offerings to be driven by roaming agreements reached through market-based negotiations. While such commenters may not have obtained roaming services at their preferred rates, there is no evidence that those outcomes are the result of anticompetitive conduct. As noted in Nextel Partners' initial comments, companies have valid business reasons for valuing roaming agreements differently, and those differences can logically account for the results complained of by proponents of automatic roaming.⁹

For example, MetroPCS, a carrier operating in major metropolitan areas, complains that it has found it "extremely difficult to reach suitable arrangements at reasonable rates with the major national carriers."¹⁰ In other words, MetroPCS wishes the rates were lower. At the same time, however, MetroPCS acknowledges that it seeks to obtain a valuable service through these negotiations¹¹ – a service that it will undoubtedly resell for a profit. In any competitive market, negotiations such as these should be expected to be difficult and contentious. Moreover, MetroPCS acknowledges that notwithstanding the price it must pay for roaming, it is still a vigorous and successful competitor in its markets.¹² In no competitive market would a company be expected to freely give away something a competitor will use to increase its revenues and strengthen its position. "Difficult" negotiations do not evidence anticompetitive conduct.

⁹ Nextel Partners Comments, pp. 6-8; Sprint Nextel Comments, pp. 14-15.

¹⁰ MetroPCS Comments, p. 3.

¹¹ *Id.*

¹² *Id.*

Leap Wireless argues that anticompetitive conduct exists because it must pay more to roam on large carriers' networks than on rural carriers' networks.¹³ Yet, if Leap's end users place more value on the ability to roam on large national networks, the market rate for urban roaming *should* be higher. As noted in Attachment B to Leap's Comments, it resells roaming for up to \$0.59 per minute – if Leap can recover that level of revenue by providing access to a large urban market, the wholesale rate for that service should properly reflect that value.¹⁴

Leap also complains that carriers offer rates to affiliates that are different than rates that are offered to competitors.¹⁵ As noted in Nextel Partners' initial comments, affiliates in competitive markets should be expected to operate on different terms than are offered to competitors.¹⁶ McDonalds does business with its franchisees on terms it would never offer to Burger King, but because there is competition in the fast food industry, there is no market failure that needs to be fixed by regulators. The same logic holds here.

Leap and SouthernLINC also claim that intercarrier roaming rates that are higher than end user rates are *per se* anticompetitive.¹⁷ Yet, these are different markets and there is no reason that market forces would necessarily lead to the same per-minute rate. A retail customer will place a value on a minute-of-use based on his or her own subjective needs, while a carrier views a roaming agreement as an asset it can use to resell roaming minutes at a profit, to add to

¹³ Leap Comments, p. 14.

¹⁴ In addition, Dr. Gregory L. Rosston's analysis notes that given the higher cost of urban licenses, higher urban roaming rates are to be expected. Sprint Nextel Comments, Attach. ¶ 55.

¹⁵ Leap Comments, p. 13.

¹⁶ Nextel Partners Comments, p. 14.

¹⁷ SouthernLINC Comments, p. 15; Leap Comments, pp. 19-20.

its subscriber base, and to increase its monthly rates. That profit motive impacts negotiations and leads to different market rates.

All of these arguments rely on the flawed proposition that a certain result is determinative of the presence of anticompetitive conduct. This is simply not true. As the Federal Trade Commission Chief testified to Congress: “it is crucial to separate anticompetitive conduct from market driving outcomes so as not to chill competitive conduct.” 2000 WL 265635 (F.T.C.) March 9, 2000. *See also In the matter of International Harvester Company*, 104 F.T.C. 949, Dec. 21, 1984 (No. 9147) (“The [Federal Trade] Commission does not ordinarily seek to mandate specific conduct in specific social outcomes, but rather seeks to ensure simply that markets operate freely, so that consumers can make their own decisions.”). The Commission should reject requests to use a specific outcome as a proxy for anti-competitive conduct.

Finally, the lack of legitimate evidence of anticompetitive conduct is further highlighted by the absence of formal complaints to the Commission alleging specific conduct that violates the Act. If these commenters could identify unlawful conduct, as opposed to market outcomes they do not like, they would have presumably taken formal action. In the absence of such action the Commission should presume that carriers are making decisions for pro-competitive reasons, and reject requests to impose burdensome regulatory requirements.

II. NEXTEL PARTNERS STANDS BY ITS DEALINGS WITH SOUTHERNLINC

SouthernLINC, an aggressive proponent of automatic roaming, claims its position is supported by its negotiations with Nextel Partners and Nextel Communications. The Commission should reject SouthernLINC’s claims. Nextel Partners’ actions have been appropriate and pro-competitive, and the fact that SouthernLINC does not like the outcome of those negotiations is not a valid reason to change national policy.

A. Nextel Partners Has Negotiated With SouthernLINC and Has Offered to Enter Into a Roaming Agreement

SouthernLINC proposes a fundamental change in the Commission's approach to regulating intercarrier roaming because it does not have a roaming agreement with Nextel Partners, and does not like the terms of its agreement with Nextel Communications.¹⁸ Contrary to SouthernLINC's suggestions, however, Nextel Partners has not refused to negotiate with SouthernLINC, and has in fact offered to enter into a roaming agreement.¹⁹ No agreement has been reached because the rates and terms Nextel Partners deems reasonable have not been accepted by SouthernLINC, and vice versa. This fact, in and of itself, does not constitute evidence of anticompetitive conduct, and is much more likely the result of markets working as they should.

As Nextel Partners discussed in its initial comments, carriers are differentially situated and value roaming agreements differently.²⁰ Every carrier can and should evaluate whether entering a roaming agreement on terms that are offered will advance its ability to generate revenue. With regard to intercarrier roaming revenue, Nextel Partners does not have mechanisms in place today that would allow it to recognize, measure and bill for roaming traffic. If Nextel Partners were to sign a nationwide roaming agreement with SouthernLINC, it would need to implement that capability throughout its service territory for what would be a relatively small number of minutes. It is fully appropriate for Nextel Partners to set a rate it believes would compensate it for making these significant network and operational changes.

¹⁸ SouthernLINC Comments, p. 3.

¹⁹ SouthernLINC's consultant recognizes this at page 8 of his report where he refers to Nextel Partners' "pricing offer."

²⁰ Nextel Partners Comments, pp. 6-8.

Nextel Partners also has little reason to believe that a roaming agreement with SouthernLINC will allow it to generate significant customer revenue. Nextel Partners has focused its efforts on providing customers with a large footprint by building out its own network and through the buildout of its affiliate Nextel Communications.²¹ It would be a significant change in the company's strategy to begin to provide service to its own customers through the use of roaming agreements. Such a change would have a significant impact on Nextel Partners because a core feature of its service plans is that it does not separately assess its own customers roaming charges. So, unlike other carriers who may recover the cost of intercarrier roaming charges through per-minute roaming rates, Nextel Partners would need to generate new customers or raise its monthly rates in order to offset the additional costs it would incur. Nextel Partners doubts that such benefits would come simply by having access to a relatively small area of additional coverage in parts of four southern states. If Nextel Partners is right, paying intercarrier roaming rates to SouthernLINC for this additional coverage will be a losing proposition. It is perfectly reasonable for Nextel Partners weigh these and other impacts on its business as it negotiates with SouthernLINC.

The Commission should recognize that many legitimate factors impact a party's position in commercial negotiations and must reject SouthernLINC's incredible claim that the mere fact that it does not have an agreement with Nextel Partners is proof of "the existence of market failure."²² When markets operate as they should, there are buyers, sellers, and those that choose to neither buy nor sell. Nextel Partners has taken a negotiating position that in its judgment will allow it to use its own assets to generate the best return for its stockholders. SouthernLINC has

²¹ Nextel Partners Comments, p. 8.

²² SouthernLINC Comments, p. 3.

opted not to do business with Nextel Partners on these terms. This is fully consistent with the operation of competitive markets.

The Commission has long made clear that a carrier engaging in anticompetitive or discriminatory conduct is subject to action under Sections 201, 202, and 208 of the Act.²³ SouthernLINC has never pursued such a remedy, and certainly could not prevail based on the vague and conclusory allegations contained in its Comments.²⁴ The Commission should not change national policy based on unproven and baseless allegations of anticompetitive conduct, and should instead recognize that if a carrier has legitimate, specific reasons to challenge the actions of a competitor, it should do so through the proper avenues.

B. SouthernLINC's Business Challenges are the Result of its Own Business Decisions

The Commission has historically relied on competition to bring benefits to consumers. When vibrant competition exists, carriers put their resources behind business strategies that they believe will successfully differentiate their service. Consumers, then, reward the carriers that provide differentiated services and offer the most value. By allowing carriers to pursue their own preferred business strategies and to reap the benefits of their product differentiation, the Commission ensures that good decisions and innovation are rewarded, which ultimately benefits consumers. One would consider it absurd to suggest that the Commission should legislate away product differentiation, or give to one competitor the fruits of another's investment decisions. Yet, that is exactly what SouthernLINC is proposing, and its proposal should be rejected.

²³ See *NPRM*, ¶ 34.

²⁴ SouthernLINC identifies no specific action by Nextel Partners that is claimed to be unlawful or anticompetitive.

SouthernLINC's basic complaint is that it has challenges to overcome as it tries to sell service plans to customers that want coverage outside of its four-state service area. There is a geographic aspect to this challenge – SouthernLINC is a regional carrier that has not sought to establish a national presence. There is also a technical aspect to this challenge – SouthernLINC is one of very few iDEN providers. Both of these challenges are a direct result of SouthernLINC's own business decisions. Yet, while these business decisions make it more difficult to capture some customers, they have also created significant product differentiation that allows SouthernLINC to succeed with other market segments. These trade-offs are part of business and are not to be regulated away.

SouthernLINC provides service in parts of four southern states. As SouthernLINC states in its comments, it is and has always been a regional carrier.²⁵ During the past 10 years, many other regional wireless carriers have expanded their service territories by purchasing new license areas, or through mergers and acquisitions. SouthernLINC made a business decision that it would best serve its investors by remaining a regional carrier, building out its service area and marketing to its strengths. SouthernLINC has reaped the benefits of this strategy, as it has a strong customer base and is a formidable competitor in its service areas. At the same time, however, its decision to be a regional carrier has meant (and should mean) that it will have a harder time meeting the needs of customers who desire a nationwide network. These customers are more likely to find value from a carrier that has put their resources into developing a national footprint. SouthernLINC's challenge to meeting the needs of this one market segment is simply the logical result of its business decision to differentiate itself as a regional carrier.

²⁵ SouthernLINC Comments, p. 24.

Similarly, SouthernLINC chose to purchase SMR licenses and to utilize Motorola's iDEN platform. This has provided SouthernLINC with tremendous benefits, as the iDEN platform can provide voice dispatch service superior to any other. iDEN has allowed SouthernLINC to serve the special communications needs of its affiliated utility companies and to differentiate its product with consumers. Again, however, most business decisions involve a trade-off. SouthernLINC's choice to use a differentiated technology necessarily meant that there would be few other networks using the same technology which necessarily impacted roaming opportunities. What SouthernLINC wants is to reap the benefits of using iDEN technology but eliminate the associated challenges that come with this differentiation. SouthernLINC should – as every other carrier – take the “pros” and the “cons” of its chosen technology and compete head-to-head with others that are doing the same.

The Commission should recognize every carrier will have challenges in meeting the needs of every market segment. If SouthernLINC's decision to be a regional carrier using iDEN technology has meant that it will be more expensive or difficult to provide nationwide coverage areas, that is an appropriate market outcome that should not be fixed by regulators.

III. THE COMMISSION SHOULD FOCUS ITS REGULATORY EFFORTS ON THE PROPER MARKET

Proponents of an automatic roaming rule rely heavily on analyses that argue there is market failure because of insufficient competition in the various markets for roaming services.²⁶ By defining the “market” as the market for roaming service, these commenters have departed from Commission precedent and sound economic principles. As a result, their recommendations should be disregarded. The proper focus for any Commission analysis must be the end-user

²⁶ See SouthernLINC Comments, p. 11; Leap Comments, p. 13.

market, and end-users have sufficient competition for in-network and out of network wireless service.

SouthernLINC sponsored an economic analysis by Dr. Preston McAfee that evaluates the number of carriers that can offer CDMA, GSM, and iDEN roaming services.²⁷ By defining the market very narrowly, he concluded there is “market failure.”²⁸ Similarly, Leap Wireless sponsored an analysis prepared by the ERS Group that focuses on “the CMRS market for wholesale services” and concludes that the low number of available roaming parties has affected wholesale rates.²⁹

These analyses are misguided. The Commission has consistently found that its regulatory policy should be focused on the market or end users service. In approving the AT&T-Cingular merger the Commission said:

[W]e find that there are separate markets for interconnected mobile voice and mobile data services, and also for residential and enterprise services. For the reasons explained below, however, we will not distinguish mobile data subscribers from mobile voice subscribers, or enterprise subscribers from residential subscribers. Instead of a separate analysis of each of these services, we will analyze all of them under the combined market for mobile telephone services.³⁰

Wholesale markets may not have the same level of competition as do retail markets, but that will be true in most competitive markets. In fact, the Commission’s policy of encouraging competing

²⁷ See SouthernLINC Comments, Exhibit B, p. 5.

²⁸ SouthernLINC Comments, Exhibit, pp. 14-16.

²⁹ Leap Comments, Attach. A, p. 3.

³⁰ *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd 21522, ¶ 74 (2004).

technologies, which it has found to greatly benefit consumers, has guaranteed this result.³¹ What the Commission properly decided, however, was that this tradeoff would best benefit consumers. As in most markets, the level of wholesale competition is not a regulatory concern where the end user market remains fully competitive.

There is little question that when one focuses on the right market – the retail market for CMRS, there is effective competition that benefits consumers.³² There is also little question that consumers do have competitive options when they want to purchase wireless services outside of their home network. Carriers should continue to be allowed to take action in their own best commercial interest so long as robust end-user competition is not compromised.

Practical considerations also require a focus on the end-user retail market. It is one thing for the Commission to monitor whether consumers have adequate choices between providers for CMRS. It is another thing altogether for the Commission to ensure that every part of a bundled CMRS service offering is able to be offered by all competing carriers. Proponents of automatic roaming do not want to be at a disadvantage as they compete for customers that want plans with nationwide roaming.³³ However, there are also market segments that value many other things, such as:

³¹ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 05-71, Tenth Report, FCC 05-173, ¶¶ 106-107 (2005) (use of multiple technologies is an important and beneficial aspect of U.S. markets).

³² See, e.g., SouthernLINC Comments, Exhibit B, p. 3 (“Competition for *retail* CMRS services appears vigorous.”); Leap Comments, Attach. A, p. 4 (accepting that “retail market conditions may be sufficient to compel carriers to compete with respect to mobile wireless service in general”).

³³ See, e.g., Leap Comments, Attach. A, p. 17 (wholesale practice “restricts ability of regional carriers to compete effectively with respect to consumer segments for which nationwide

- * network reliability;
- * the local presence of a regional carrier;
- * specific technology;
- * interoperability with certain devices; and
- * the ability to receive certain exclusive media content;

Each of these is not a separate “market.” These are parts of retail plans that differentiate one carrier from the other. So long as there is competition in the industry, it would be bad policy (and impossible) for government to require all carriers to have the same competitive strength in all market segments. Instead, government should be in the business of allowing different carriers to succeed in those market segments where they have developed a competitive advantage.

IV. SOUTHERNLINC’S PROPOSAL FOR A DEEMED REASONABLE RATE IS FRAUGHT WITH PROBLEMS

If the Commission decides to require automatic roaming, it must reject SouthernLINC’s proposal to set carrier roaming rates at per-minute levels that are offered to a carrier’s highest use retail customers.³⁴ Such a rule would not produce outcomes one would find in a competitive market, and would create regulatory arbitrage.³⁵

A. A “Lowest Prevailing Rate” Proposal Has Significant Implementation Problems

SouthernLINC proposes that the Commission establish that if a carrier charges roaming rates to another carrier “that exceed its own lowest prevailing rates” offered to consumers, that

coverage is a significant factor; regional carriers are on a level playing field only with respect to customers who do not place much value on the ability to roam”).

³⁴ SouthernLINC Comments, p. 49.

³⁵ This section specifically addresses SouthernLINC’s proposal, but the same problems exist with the ERS Group’s proposal to price based on retail rates.

would be presumptively considered unjust and unreasonable.³⁶ SouthernLINC suggests that a carrier's "lowest prevailing rate" would be determined with reference to the retail plan with the largest number of included "anytime" minutes.³⁷

Presumably, the analysis in Attachment B, Table 1, of SouthernLINC's comments would look to Nextel Partners "Fair and Flexible" with 4000 anytime minutes priced at \$149.99. This would generate a per-minute rate of \$0.037. However, the rule proposed by SouthernLINC could also be read to require an analysis of the unlimited local calling plan Nextel Partners offers for \$199.99 per month. If Nextel Partners is willing to "offer" to sell 43,200 minutes for \$199.99, that is a per-minute rate of \$0.0046. In addition, the 4000 minute plan has free weekend calling, so those additional minutes would arguably be considered to calculate the "lowest prevailing rate."

In practice, a broad rule referring to the "lowest prevailing rate" would be subject to differing interpretations, would create significant implementation problems, and would lead to litigation. In addition, such a rule would give carriers clear incentives to price retail offerings in order to drive wholesale markets, rather than to meet the demands of end users. These (and other) implementation problems render SouthernLINC's "lowest prevailing retail rate" proposal unworkable.

B. SouthernLINC's Proposal Does Not Reflect The Value Of The Network

SouthernLINC's proposal is based on the proposition that its calculation of the "lowest prevailing rate," accurately represents the value of the roamed-on carrier's network.³⁸ This analysis is flawed for three fundamental reasons.

³⁶ SouthernLINC Comments, p. 11.

³⁷ SouthernLINC Comments, Attachment B, p. 9.

First, very few if any carrier's customers pay the per-minute rate that would be determined under SouthernLINC's proposed calculation. For example, a customer of Nextel Partners' 4000 minute fair and flexible plan might use a total of 2000 minutes, leading to a per-minute rate of \$0.074 per minute. Or, a customer may purchase a plan with 400 minutes for \$34.99 and use 200 minutes, generating per-minute revenue of \$0.175 per-minute. Because SouthernLINC's proposal assumes the largest bucket of minutes, and assumes that the largest bucket is fully used, this will clearly understate the value of a network and provides no meaningful benchmark for the Commission to use.

Second, SouthernLINC proposes that wholesale roaming minutes be sold at the retail rate charged for local calls. Local service and roaming service are valued differently in the market. Carriers that offer state-wide or region-wide calling plans charge their customers per-minute roaming rates that are dramatically higher than the retail local rates SouthernLINC proposes to pay.³⁹ Clearly, if customers value out-of-network roaming at a much higher level than they do local calls, local retail rates are an unacceptable proxy for a market rate.

Third, this proposal would create opportunities for arbitrage, as Nextel Partners would be forced to sell its assets to SouthernLINC, which would then resell those assets at a substantial profit. SouthernLINC proposes to mandate roaming rates under \$0.05 per minute and to resell those minutes at \$0.40 – a profit margin of over 700%. This result is inequitable and is not a result that would occur in a competitive market. The Commission should thus reject a proposal to establish that kind of regulatory arbitrage.

³⁸ SouthernLINC Comments, p. 49.

³⁹ SouthernLINC's web site reflects that it charges \$0.40 per minute for roaming. See https://onlinestore.southernlinc.com/storefront/sp_content/images/h1_service.gif.

C. Carriers Will Not Be Allowed To Achieve The Benefits Of Their Network Buildout

As noted in Nextel Partners' initial comments, carriers have built out networks based on the assumption that they will be able to use their buildout to gain a competitive advantage. SouthernLINC proposes to take that competitive advantage away. Today, a carrier makes decisions to add to its coverage footprint in part by looking to the additional revenue it can generate from new or existing customers. Any market participant that innovates, is the first to invest in a new area or a new technology, or otherwise differentiates itself should be rewarded with the fruits of the revenue generated by its actions. SouthernLINC proposes that the benefits any new network investment be automatically shared with the competition. This takes away much of the incentive to build, as a carrier would be better off financially allowing another carrier to build, using that carrier's network at a below-cost rate, and selling those minutes at a profit. This would be inequitable, would stifle investment, and would ultimately hurt consumers.

V. SOUTHERNLINC'S ARGUMENTS REGARDING HURRICANE KATRINA ARE MISPLACED AND FACTUALLY INCORRECT

SouthernLINC argues that the Commission should make policy to benefit regional carriers because of SouthernLINC's response to the devastation of Hurricane Katrina in 2005.⁴⁰ Nextel Partners objects to this advocacy for three main reasons.

First, all wireless carriers in these areas – not just regional carriers – took significant action to prepare for and respond to this natural disaster. SouthernLINC's suggestion that its ability to respond was the result of its "regional focus"⁴¹ is an insult to other carriers that have designed, built, and maintained networks to serve these areas for years. In fact, in responding to

⁴⁰ SouthernLINC Comments, pp. 20-25.

⁴¹ SouthernLINC Comments, p. 24.

this disaster, SouthernLINC's was likely driven by the fact that its biggest customers are its five affiliated power companies with special communications needs. This is not a "regional focus," it is a customer focus. While Nextel Partners recognizes that regional carriers are strong competitors and are in many cases well-run, it does not accept the proposition that regional companies are *per se* better at designing, building, or maintaining wireless networks.

Second, SouthernLINC's argument does not tie into its proposed regulatory action. SouthernLINC is asking the Commission to enact a rule that will facilitate having its customers roam on Nextel Partners' network. Yet SouthernLINC's discussion of Katrina appears to suggest that Nextel Partners should allow its customers to roam on SouthernLINC's network – something beyond what is proposing.⁴² In any event, the Commission's focus in this docket is neither emergency preparedness nor emergency responsiveness. While focusing on Hurricane Katrina may evoke emotion, it should not take the focus away from the question facing the Commission – whether roaming arrangements should be the product of market forces or regulatory mandate. Emergency response issues can be addressed separately.⁴³

Third, Nextel Partners has a basic disagreement regarding certain of the factual statements made by SouthernLINC. SouthernLINC indicates that 98% of its sites were up operational on September 1, 2005,⁴⁴ but that statement is not all that meaningful given that most

⁴² SouthernLINC Comments, pp. 24-25.

⁴³ For example, the Commission ordered eligible telecommunications carriers ("ETCs") in the states of Louisiana, Alabama, and Mississippi to provide eligible displaced consumers with a certain amount of free phone service. Nextel Partners is an ETC in these four states, and participates in this program. See <http://www.nextelpartners.com/products/hurricanereliefhome.aspx>. SouthernLINC is not an ETC and is not participating in this program.

⁴⁴ SouthernLINC Comments, p. 22.

of those sites would not have been affected by Katrina. SouthernLINC also suggests that it was the only source of wireless communications in Gulfport Mississippi and along much of the Gulf Coast during this time frame, but that statement is simply not true. Nextel Partners had 2 sites operating in the Gulfport area on August 31, 2005. On September 1, 2005 several leased DS3s went down, causing Nextel Partners to lose service to Gulfport, but only until the next day (September 2). And, while SouthernLINC may have had all of its sites operational by September 8, 2005, Nextel Partners had restored over 85% of the affected services by September 6, and used 11 temporary sites (including a Cell on Wheels in Gulfport) to meet customers' needs within these areas.

Nextel Partners does not object to SouthernLINC being proud of its response to this disaster, but does object to its use of this disaster in this manner to obtain unrelated regulatory relief. The Commission should disregard these arguments by SouthernLINC.

CONCLUSION

Nextel Partners respectfully requests that the Commission take action consistent with the views expressed herein.

Respectfully submitted,

NEXTEL PARTNERS, INC.

By /s/ Philip R. Schenkenberg

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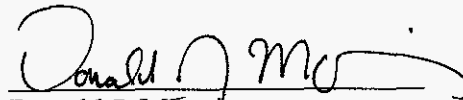
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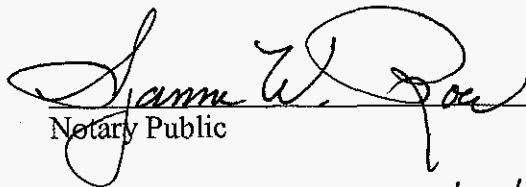
January 26, 2006

AFFIDAVIT

I, Donald J. Manning, Vice President at Nextel Partners, hereby certify on this the 24th day of January 2006, that I have read the attached Reply Comments and that to my knowledge, information and belief that the representations made in these Reply Comments are true and correct.


Donald J. Manning
Vice President

Subscribed and sworn to before me on this 24th day of January, 2006.


Notary Public

My Commission Expires: 11/7/06

